October 22, 2002

The Honorable Kathleen A. Sheehy
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, Minnesota 554012138

Re: Amendment of Environmental Quality Board Power Plant Siting Rules
Minnesota Rules chapter 4400

OAH Docket No. 58-2901-15002-1

Dear Judge Sheehy,

C.U.R.E., Communities United for Responsible Energy respectfully offers a Reply to the comments so far received on chapter 4400. We regret that we were unable to engage more fully in your hearing and comment opportunities, due to personal circumstance and timing. This rulemaking will affect generations of Minnesotans and hundreds of communities in the course of its administration. We appreciate the diligence of the parties and have followed the drafts and comments, as best we could, with great interest. We trust that you will consider our perspective & concerns in your deliberations, as you are able.

C.U.R.E. IS: a community based citizen's group in Southeast Goodhue County. The group was founded to deal with NSP's 1995 application for an alternate site for storage of nuclear waste from Prairie Island in Florence Township. C.U.R.E. communities are Frontenac, Lake City, Redwing and surrounding rural areas. We are neighbors to the Prairie Island Plant, approximately 15 miles, downriver. The following 3 paragraphs frame our involvement to date.

GOODHUE COUNTY ALTERNATE SITE MANDATE: The siting exercise proceeded under the power plant siting rules, as mandated by Chapter 641, the 1994 "Prairie Island Bill". I was on the Environmental Quality Board Citizen's Site Advisory Task Force, chaired the subcommittee on legislative and legal review, and submitted a report which was appended to the final report of the task force (1996). That report included an examination of the vital interface between certificate of need, siting procedures, and public participation.

PPSA: C.U.R.E. has remained active in power plant siting issues, attending the annual hearing and submitting comments regularly on related topics. We followed the 2001 legislative session closely as citizen advocates, participating in virtually every venue throughout the session and conference committee. We provided testimony to the Senate in support of EQB's proposed language and have worked with Mr. Mitchell, along with the other parties, during this rulemaking.

ENVIRONMENTAL REVIEW: This year C.U.R.E. represented a community perspective on the Special Advisory Committee to EQB on Environmental Review. In this venue, we advocated for increased efficiency and equity in environmental review through "UP FRONT" scoping & information development and early public involvement. The 25+ year record of the PPSA shows persistent themes. These are outlined in the excellent summary report (1983) of the Power Plant Siting

Advisory Committee which served the EQB from @1978-1983. The Committee summarized these issues; among them, the need for early public involvement in both certificate of need and siting, issues of notice, timing, and meeting formats. Their recommendations stressed the importance of the interface between certificate of need, siting and environmental review. Both committee members and insights came directly from the routing struggles of the 70's cited by MCEA.

RULEMAKING PETITION: C.U.R.E. initiated the petition for public hearing on this rulemaking. This petition was signed by a number of citizen and public Interest group representatives. The main issue named in that petition was the exemption language in the proposed rule draft at 4400.0650. The implications of the certificate of need exemption language in the 2001 bill (discussed by the parties) was the subject of a great deal of discussion during the Legislative session.

ISSUES C.U.R.E. WISHES TO ADDRESS: While MCEA and Sierra Club's comments have done an excellent job of addressing the exemption issue, the concerns about 4400.0650, raised by the petition and by C.U.R.E. in conversations with Mr. Mitchell, have not been alleviated by subsequent draft language. I would like to contribute to this discussion. We will have additional responses to comments on related matters.

4400.0650. EXEMPTIONS. Background/Context. C.U.R.E. read MCEA's comments with great interest. They place the problem of the proposed exemptions in several important contexts. In addition, C.U.R.E. would raise the specter of Cumulative Effects.

C.U.R.E. finds the argument compelling that there is not a statutory basis for the extent of these exemptions. In addition we are concerned that the exemptions may, at worst, undermine social and legal foundations of environmental law. And, at best, leave the public without procedural recourse, forcing delays and unreasonable expenditures of time and money, by pressing legitimate environmental concerns into the courts.

1) CUMULATIVE EFFECTS were identified by the EQB in its charge to the Environmental Review Special Advisory Committee, as one of its most urgent issues. The Committee made little real headway on the matter. Nevertheless, the issue continues to dominate EQB meeting agendas and public challenges to project proposals. One recent EQB meeting demonstrated precisely the points raised by MCEA about exemption from environmental review for a) capacity increases and b) the start up of a LEPGP that has been closed for some time.

This summer, a neighborhood group from St. Paul came before the Board to challenge the start up of a plant that had been closed for some time on the river front. They had 2 major concerns. First, the cumulative effect of adding the re-started plant's emissions to those of other facilities nearby. Some of these facilities were new since the shut down. Second, the neighborhood, with grants and city development, interests had invested heavily in remaking the waterfront district, the character of which would be drastically compromised they claimed, by allowing the plant to be restarted. Clearly, both socio-economic and material environmental considerations have changed signficantly since the plant was last operated. Cumulative health effects have not been evaluated. The proposed rule would provide no channel to address

these concerns. Yet under MEPA these are issues which fall under EQB's mandate. And under MERA these citizens are obligated to act upon such potential environmental effects.

The PPSA provides a framework by which to identify and evaluate potential signficant effects; it creates a channel, a tool, for the shared obligation to act to protect the environment & the public right to due process and participation. The PPSA is Minnesota's third environmental law, as the court's preface to the PEER decision elaborates. It's status is based upon the understanding that the generation and transmission of electricity has, by its nature, significant effects upon the environment.

Allowing these 'exemptions' will not change either the public impulse or obligation to act to protect the environment. It will not change the state's obligation to consider the potential for significant and cumulative effects or the need to consider alternatives and mitigation under environmental law. It will simply leave citizens no recourse but the courts. And this will not streamline the process.

CAPACITY &/OR EMISSIONS STANDARD: Finally, we concur with the Department's concern about using a capacity limit as the condition for exemptions, rather than an emissions limit. Capacity is primarily a factor of size, type and timing. EQB's responsibility for identifying and evaluating immediate and cumulative effects of emissions must not be surrendered. EQB's March 13 draft addresses this discrepancy more effectively, under (then) section 0600. If neither MCEA's nor Sierra Club's language change recommendations is acceptable to EQB, perhaps this draft should be reevaluated on its merits and ability to bridge the gap:

"The following projects shall not be considered construction of a large electric power generating plant or constructin of a high voltage transmission line and may be constructed without a permit from the Environmental Quality Board.

A. Equipment additions at an existing substation that do not require changes to high voltage transmission lines outside the substation and that do not require expansion of the land needed for the substation and do not involve an increase in the voltage.

B. Reconductoring of an existing high voltage transmission line on the existing structures with no change in voltage and no change in right of way.

C. Modification of existing equipment at an existing power plant site that Results in additional power production capacity but which does not require any expansion of the footprint of the plant and does not result in increased discharge or emission of pollutants, or environmentally signficant cumulative effects [C.U.R.E. addition]

D. Start up of an existing large electric power generating plant that does not involve a change in the fuel or an expansion of the footprint of the plant and does not result in increased discharge or emission of pollutants, or environmentally signficant cumulative effects [C.U.R.E addition]

E. Minor alterations to a LEPGP or a HVTL for which a permit already exists. Minor alterations shall be considered under part 4400.3800."

MAINTENACE: "Routine or Emergency" Maintenance, should remain the modifer for maintenance or repair that is exempted from review. In this case MCEA's recommended language does not satisfay C.U.R.E.'s specific concerns (below, but we do not know how to reply to the definitional issues. We do not feel that the rationale in the SONAR for changing the EQB draft language is sound or reflective of statutory intent. "Routine or Emergency" should remain the modifier.

EXPRESS CONCERN FOR APPLICATION OF EXEMPTIONS TO PRAIRIE ISLAND. C.U.R.E. is particularly concerned that the exemption language not be constructed or construed to allow expansion of the dry cask facility or refurbishment of the nuclear power plant (such as steam generator replacement) to evade environmental review. "Refurbishment" SHOULD NOT be exempted from review. C.U.R.E.'s objection to this exemption is grounded in analysis of Xcel's Integrated Resource Plans and the implications of the Certificate of Need exemption in the 2001 legislation.

It is a prime concern of the coalition of parties that signed the petition for hearing that any significant change in the status of the nuclear facility should undergo economic and environmental review. This concern is heightened rather than resolved by the proposed exemptions. I regret that I do not know how to adequately address you on the matter at this time.

NOTICE: C.U.R.E. finds the compromise language recommended by MCEA at page 15, under 4400.0650, subpart 3 an important, if minor, concession to public notice. We disagree with MCEA's premise that "the actions covered by this notice provision are expected to be relatively minor". And we strongly object to MTO's recommendation that the rules relieve failure to notice EQB of activities under the proposed exemptions, of any prejudice. It is inappropriate to have no mechanism whatsoever by which affected parties, individuals, communities can be noticed of these initiatives.

STREAMLINING GOALS AND EXEMPTIONS: In the old paradigm "streamlining" is accomplished by a non-critical evaluation of the application, as little information up front as possible, public engagement constrained to mandated hearing formats, and optimizing exemption opportunities. This strategy no longer works. The stakes are too high, the public is too invested and informed. The diversion of resources into armed camps and legal battles is a luxury that we can no longer afford. And the social capital we need to ensure that we have an adequate energy infrastructure cannot be rebuilt using the strategies that have created a breakdown of public confidence from Wall Street to Main Street. These are challenges that this rulemaking and implementation cannot avoid.

RULEMAKING IS NOT PRIMARILY A NEGOTIATION OF "INTERESTS": The 'streamlining' goal of the 2001 legislation was greatly influenced by utility concern for the competitive pressures of deregulation and the need for transmission to support

burgeoning competitive, market transactions. Legislative deliberation was shaped by several factors:
1) utility forecast claims of energy shortages up to 6,000 MW by 2010, much publicized by the media in the wake of the California energy crisis; &
2) utility claims that a history of unreasonable public opposition and interminable regulatory procedures were responsible for failures to effectively route transmission lines & generating facilities.

These premises were effectively challenged in Senate committee, respectively, by the Department of Commerce and EQB staff. The DOC showed 2,000 MW shortfall with almost half already in the pipeline. But despite the 'reality checks' these heavily lobbied positions remained influential through the session. The utility planning group, MAPP lowered its estimate to @ 3,500 just a week after the close of session.

In the midst of these pressures, EQB's proposed legislative language changes to the PPSA sought to address decades of delay and conflict over EXEMPTIONS, and the complexities of trying to address issues related to size type and timing without the benefit of C/Need proceedings. Exemptions have historically tended to create diversions that delay siting and routing and perpetrate distrust, conflict and legal action. C.U.R.E. cannot see, given the level of concern raised in these proceedings, how the new set of exemptions in the proposed rule will can avoid a similar dynamic.

THE GOOD NEWS: EQB's initiative in drafting and distributing language during the legislative session was effective and admirable. Mr. Mitchell has been vigorous and thorough in his efforts to get rules drafts & rationale (SONAR drafts) before all interested persons. He has attempted to draft a rule that balances the need to ensure timely review, to align project types and review requirements proportionately and provide due public process. Most of the weaknesses identified in the comments with which C.U.R.E. identifies, as we proceed, can be alleviated by:

a) holding the rule to the standard of EQB's expertise and the purpose and intent of environmental law;
b) avoiding the pitfalls of regulator as "interest" referree; and
c) mediating the crisis mentality of the 2001 session with a professional understanding of the enduring issues.

PROCEDURE AND PUBLIC PROCESS: Process and public engagement hazards will be abated by setting standards in rule for UP FRONT, critical review of applications, development of information and timely notice and constructive early engagement of the public. C.U.R.E. disagrees vehemently with the SONAR statement cited by MCEA at page 17, that "it is not in anybody's interest for the chair to reject an application".

The EQB PPSAC and PPSA hearing participants have insisted for over 25 years that the process would be MUCH improved if applications were critically reviewed up front and not accepted until they were substantially, not simply procedurally, complete and ready for public scrutiny. This is a critical streamlining juncture. Time and social capital is wasted when information is not produced UP FRONT and must be dragged out of the applicant.

The acceptance of an application is a pivotal act in determining the course of

a review. The scoping process is the critical exercise; C.U.R.E. concurs with MCEA's analysis. The chair & staff should utilize public comment to focus the scope of review (throughout the rule), upon the issues of concern to interested and affected members of the public, as well as those identified by EQB, its agencies and the proposer. UP FRONT identification of issues is a crucial (new paradigm) streamlining measure, benefiting all parties.

PUBLIC POLICY: Finally, MCEA properly asserts that the exemption provisions have the potential to undermine 25 years of public policy requiring a transition to more environmentally sound and sustainable energy technologies. It is an express duty of EQB under 116C.57, to advance and apply information about new technologies to environmental review & consideration of alternatives in siting and routing. This is a pivotal moment. Our energy future hangs in the balance. It is not the time to widen the loop holes that allow old polluting technologies to continue to generate profits and benefits today, for the few, and undetermined risks and costs for our future generations.

C.U.R.E. appreciates the good faith shown by the parties, the fine public advocacy work of Sierra Club and MCEA, agency insights (we did not have access to DNR's comments) and the climate of good will, diligence and cooperation modeled by EQB staff in this rulemaking. We look forward to your recommendations.

Most respectfully yours,

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